

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 CASE NO 08-01789-brl

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5 In the Matter of:

6 SECURITIES INVESTOR PROTECTION CORPORATION,

7 Plaintiff-Applicant,

8 - against -

9 BERNARD L. MADOFF INVESTMENT SECURITIES, LLC., et al

10 Defendant.

11 - - - - -x

12 In re:

13 BERNARD L. MADOFF,

14 Debtor.

15 - - - - -x

17 U.S. Bankruptcy Court

18 One Bowling Green

19 New York, New York

20 September 5, 2012

21 10:04 AM

22 B E F O R E:

23 HON. BURTON R. LIFLAND

24 U.S. BANKRUPTCY JUDGE

25 ECRO - EMMANUEL

1 Adversary proceeding: 08-01789-brl Securities Investor
2 Protection Corporation v. Bernard L. Madoff Investment
3 Securities, LLC, et al
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5 (cc-4920) Motion for Order Scheduling Hearing on Trustee's
6 Motion Affirming Denial of Time-Based Damages Adjustment to
7 Customer Claims

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25 Transcribed by: Shelia Orms

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BY: MARK RICHARDSON, ESQ.
MARCY RESSLER HARRIS, ESQ.

1 P R O C E E D I N G S

2 THE COURT: Be seated.

3 THE CLERK: SIPC v BLMIS.

4 (Pause)

5 MR. SHEEHAN: Good morning, David Sheehan from Baker
6 Hostetler for the Trustee.

7 MR. BELL: Kevin Bell with -- for the Securities
8 Investor Protection Corporation.

9 MS. HARRIS: Good morning, Marcy Harris from Schulte
10 Roth & Zabel for the objectors.

11 MR. RICHARDSON: Mark Richardson, Schulte Roth &
12 Zabel.

13 MR. PEREZ: Alfredo Perez for Weil Gotshal for one of
14 the objectors, Your Honor.

15 THE COURT: Yes.

16 MR. SHEEHAN: Your Honor, this is the return date of
17 the trustee's motion for a scheduling order with regard to what
18 we're terming the time based issue, referred by the SEC as
19 constant dollar. That is, whether or not there is, as part of
20 their net calculation an interest factor that should be part of
21 that analysis. And our position, obviously, is that it should
22 not.

23 However, that issue is for another day. Today we're
24 here to talk about the scheduling of that. And we have a few
25 objections to even that application. Two of them I don't think

1 we need to dally too long with, the Serabians (ph) who have
2 appeared here many times without standing, whose claim has been
3 expunged, and which we believe should be dismissed out of hand
4 by the Court. We also have the --

5 THE COURT: Are the Serabians here or represented?

6 (No response)

7 MR. SHEEHAN: Thank you, Your Honor.

8 THE COURT: The answer is no.

9 MR. SHEEHAN: And then Mr. and Mrs. Chambers wrote a
10 letter which we filed with the Court, they'd sent it to us,
11 which is, in a way, an objection, but again I don't believe
12 they're really rejecting to the notion of an interest factor.
13 They think that there should be one. They agreed with us on
14 the three percent, and with Your Honor's ruling, of course.
15 But that is noted. I don't believe that stands in the way of
16 ruling in the trustee's favor this morning.

17 One objection, however, that we do need to address is
18 the HH1 objection. And I'd like to, if I could, just because I
19 know Your Honor's familiar with the papers, just to sort of
20 talk about how we got here. Because it's -- I think by going
21 through that history it reveals the outcome of what should
22 happen here.

23 One is this, is we had a bar date. It's called July
24 2009, there was a motion made, Your Honor is fully familiar
25 with it, by those who were concerned that they did not want to

1 file a claim. The trustee had already announced what his
2 position was, is that it was money in and money out, and that
3 was the way we were going to determine customers claims.

4 And Your Honor at that time recalled -- I recall Your
5 Honor saying, well, it's a Hopson's choice and one you're going
6 to have to make, whether you're going to file a claim or not.
7 HH1 made a decision not to file a claim, a tactical decision
8 not to file that claim, not to participate as a customer in
9 these proceedings, or as a customer complainant.

10 So now later on what happens is, they do get sued, and
11 there's an avoidance action filed by the trustee, because they
12 in fact are net winners, and receive fictitious profits which
13 need to be returned to the customer fund.

14 At that time, there was a flurry of activity in the
15 district court that Your Honor has a vague familiarity with in
16 terms of antecedent debt, and a host of other issues that are
17 being decided by Judge Rakoff. Another tactical decision is
18 made. That decision is made to join into those proceedings and
19 move for a withdrawal of the reference and is granted, with
20 regard to the issue of antecedent debt. And that issue is now
21 currently before Judge Rakoff. It's been briefed and argued
22 and awaiting decision.

23 Judge Rakoff, along the way, had also decided that he
24 was not going to deal with the issue of constant dollar, as he
25 called it. He saw it as a customer issue, one that within the

1 four corners of the statute rightly belong before Your Honor.
2 A decision that Your Honor should arrive at after reviewing the
3 statute and reading the briefs and hearing from all sides.

4 So what we have here this morning is an attempt by HH1
5 to suggest to Your Honor, well, not withstanding those two
6 tactical decisions that we made, we're not liking the outcome.
7 Because the way you framed the motion, trustee, you said that
8 since we can't file a claim we can't participate here. Well,
9 they shouldn't. They're part of the customer fund. They're
10 not a customer claimant. They made a tactical decision not to
11 participate. We didn't make that decision, they did.

12 Then what happened is, is when they found out that
13 Judge Rakoff wasn't going to take into account --

14 THE COURT: Other similarly situated have filed
15 claims; is that correct?

16 MR. SHEEHAN: That's correct, Your Honor. Many, many
17 people similarly situated have filed claims.

18 THE COURT: Including some of the HH1 --

19 MR. SHEEHAN: Indeed, Your Honor. Some of the HH1
20 participants --

21 THE COURT: Represented by counsel here this morning.

22 MR. SHEEHAN: Correct, Your Honor, that's absolutely
23 right.

24 So rather than persist, Your Honor, let me just go
25 right to the bottom line. Put bluntly, HH1 just does not have

1 standing here. What we have is an issue of cost of dollar
2 rightly decided by Judge Rakoff that should be decided by Your
3 Honor, it's rightly here, it's your decision.

4 THE COURT: Well, some members of the HH1 do have
5 standing here.

6 MR. SHEEHAN: And they do. And they indeed will be
7 heard, and they will participate in this proceeding. So, Your
8 Honor, we would obviously maintain that the HH1 participant
9 here should not have standing and should not be able to
10 participate.

11 One last thing, it's administrative, I wanted to alert
12 Your Honor to it. As Your Honor knows, HH1 also had concerns
13 with our scheduling. We worked out something we believe
14 adjusts everything by three weeks. Later on, I can put it on
15 the record for Your Honor and see if Your Honor is amenable to
16 that suggested change. Thank you, Your Honor.

17 MR. BELL: Your Honor, the bar date's ineluctable. If
18 you didn't file a claim, you lost, you said that in February of
19 '09 when we had an issue before you and you talked about
20 Hobson's Choice. Both the Second Circuit and the Tenth Circuit
21 have so ruled. Some HH1 claimants are a part of this motion,
22 others are not. And that's -- SPIC supports the trustee's
23 position. Thank you, Your Honor.

24 MS. HARRIS: Good morning, Your Honor.

25 THE COURT: Good morning.

1 MS. HARRIS: I'm here on behalf of -- the client is
2 HHI No. 2 Trust, that's one of the clients that we're here for
3 today and there are other clients. HHI-2 did file a claim, in
4 fact, but there are other clients that did not.

5 But the issue here today is not as the trustee
6 presents it. It doesn't have to do with the bar date and
7 claims. The issue here is how to calculate net equity, and as
8 Your Honor knows, several years ago, the Court dealt with that
9 issue and the Second Circuit affirmed this Court's decision in
10 a decision that said, how do you calculate net equity.

11 The issue today and that we seek to brief on the next
12 cycle is whether the net equity calculation should be adjusted
13 for a constant dollar adjustment, whether the time value of
14 money should be included in that calculation. It's not
15 strictly a customer claim issue. It transcends those who filed
16 claims. It's a customer net equity issue.

17 SIPC requires the trustee to determine the net equity
18 of each and every customer. Some customers have positive net
19 equity and those are the ones who may be entitled to recover
20 from SIPC and from the pool of customer property. Other
21 customers have negative net equity, and those are the customers
22 whom the trustee has brought avoidance action claims against,
23 and seeks to recover their transfers.

24 The question that the Court will address in the next
25 briefing cycle is whether net equity for all customers,

1 positive net equity and negative net equity should be adjusted
2 for inflation or put on the constant dollar adjustment, so that
3 regardless of when you became an investor in Madoff, you're
4 treated equivalently. That's the issue here. It's not a bar
5 date issue.

6 And the avoidance action defendants, those who have
7 been sued by the trustee and face avoidance claims have real
8 actual standing to be heard in this court on the issue of how
9 to calculate net equity. Because if the Court determines how
10 to calculate net equity and they're not allowed to participate,
11 their rights may be permanently taken away and they may be
12 irreparably harmed.

13 So they're here today not because they filed or didn't
14 file claims, but because they are customers for whom an equity
15 determination has been made, that's how the trustee decided how
16 much to seek to avoid from them. And the issue that remains to
17 be briefed on net equity is whether the net equity calculation
18 should be adjusted to take into account the time value of
19 money.

20 The issues relating to calculation of time value --
21 calculation of net equity and whether it should or should not
22 include an adjustment for the time value of money is not an
23 issue that's being addressed in the district court. The
24 district court judge refused to hear that issue. He said it's
25 probably a bankruptcy court decision. That's why the trustee

1 has sought to have the calculation determined by this court on
2 a briefing schedule that we're prepared to agree to. But it's
3 not the same issue as the antecedent debt issue that has been
4 heard and will be determined in the district court.

5 So the suggestion that it's the same issue or that
6 there's going to be confusion or a risk of inconsistent
7 decisions to the courts is not correct. The issue has been --
8 they're separate issues and we're not seeking to address issues
9 that have been before the district court judge and in the
10 district court, neither the papers, the litigants or the Court
11 agreed to address the issue that's before this Court.

12 I just want to point out also that previously the
13 trustee himself has acknowledged that the methodology for
14 calculating net equity affects all customers, not simply those
15 with positive net equity who may have filed customer claims.
16 The trustee in his words said, and I quote, "The trustee's
17 duties are to the estate and the customer class as a whole.
18 Unless the net investment method is used to calculate both net
19 equity claims and avoidance amounts of principal and fictitious
20 profits, SIPC and the Bankruptcy Code would apply unequally to
21 BLMIS account holders and would contravene the Second Circuit
22 net investment ruling. Nothing in the Bankruptcy Court,
23 SIPC --"

24 THE COURT: Correct me if I'm wrong, you've moved to
25 withdraw the reference on the avoidance action; is that

1 correct?

2 MS. HARRIS: On certain issues relating to the
3 avoidance actions.

4 THE COURT: Right. And that's pending before Judge
5 Rakoff, or that's already been determined, he's withdrawn the
6 reference.

7 MS. HARRIS: As to certain issues, but not as to the
8 constant dollar issue which is the issue that's been briefed.

9 THE COURT: But he's withdrawing the reference with
10 respect to the avoidance actions. I don't have your avoidance
11 action here; is that correct?

12 MS. HARRIS: I didn't hear you, I'm sorry.

13 THE COURT: I don't have your avoidance action here,
14 am I correct?

15 MS. HARRIS: He only -- I don't believe that is
16 correct.

17 THE COURT: He has to make a determination on that,
18 and I should respect that, and I should wait and abide by that.

19 MS. HARRIS: If that's the Court's determination, then
20 we would ask to stay briefing on an issue that affects
21 avoidance action defendants. Judge Rakoff has indicated that
22 he will rule on all of the Madoff matters pending before him he
23 believes by year end. It's already September and the briefing
24 schedule that's been proposed will put this matter to hearing
25 in January.

1 THE COURT: And he's referred a very narrow issue
2 before me, and that's the constant dollar issue.

3 MS. HARRIS: That is exactly the issue that we're --

4 THE COURT: No question about that.

5 MS. HARRIS: The constant dollar issue is the --

6 THE COURT: Okay.

7 MS. HARRIS: -- issue that we seek to address.

8 THE COURT: Yes.

9 MS. HARRIS: And have the Court address.

10 THE COURT: Do you have anything else?

11 MS. HARRIS: I didn't hear you?

12 THE COURT: Do you have anything else?

13 MS. HARRIS: I just wanted to address the briefing
14 schedule that will be proposed, and that is, we would like an
15 opportunity to respond to any position that the SEC may take,
16 and I don't think that was part of the briefing that was going
17 to be proposed.

18 THE COURT: The SEC hasn't taken any position; is that
19 correct?

20 MR. SHEEHAN: Not that -- with regard to this
21 application here, but as Your Honor knows, during the net
22 equity briefing --

23 THE COURT: I understand that, yes.

24 MR. SHEEHAN: Right. But as of today, no, they have
25 not.

1 THE COURT: That's been an inside Washington affair
2 and not a Bankruptcy Court matter.

3 MR. SHEEHAN: Refer to Mr. Bell to all things inside
4 Washington.

5 MR. BELL: Your Honor, the Commission has told in
6 light of certain happenings in their staffing, the Commission
7 is reconsidering its position on constant dollar some time in
8 the near future. They've --

9 THE COURT: They've been doing that consideration
10 dance for a number of months, if not a year.

11 MR. BELL: We await the phone call.

12 THE COURT: Very well.

13 MR. PEREZ: Your Honor, Alfredo Perez. I don't have
14 anything to add to what Ms. Harris said, but I will make the
15 practical comment that just for purposes of judicial
16 efficiency, it might be in the Court's interest to have both
17 the preference defendants as well as the customers who filed
18 claims arguing this issue before the Court, as opposed to kind
19 of doing it seriatim as the case may be.

20 MS. HARRIS: And, Your Honor, may I just be heard on
21 one more issue?

22 I just want to point out that the avoidance action
23 defendants, notwithstanding having removed and sought
24 withdrawal and remove the action to federal court in the
25 district court, there's still parties in this court, in this

1 proceeding. They still have to get adjournments from the
2 trustee to file answers or motions to dismiss against the
3 pending avoidance actions --

4 THE COURT: I assume that collegially --

5 MS. HARRIS: -- that have been brought.

6 THE COURT: -- you continue to cooperate with each
7 other until there's some definitive word from any of the
8 courts.

9 MS. HARRIS: My point, though, is that there's still
10 defendants before this court. Otherwise, they wouldn't have to
11 keep getting extensions. The matter wouldn't be on the
12 schedule in this court. And so either we would ask that the
13 Court defer hearing briefing until after the district court
14 rules, and then there's the matter can be remanded. There's no
15 issue.

16 THE COURT: The district court has remanded a specific
17 issue for me to determine and --

18 MS. HARRIS: This is --

19 THE COURT: -- there's no reason that I should counter
20 that by just sitting back and playing ping pong with the
21 district court. This is an issue which has been placed
22 squarely before me, and the parties are geared up for it.

23 MS. HARRIS: But all of the parties are geared up for
24 it.

25 THE COURT: Do you have anything else, ma'am?

1 MS. HARRIS: No, that's it.

2 THE COURT: Thank you.

3 MR. SHEEHAN: Nothing further, Your Honor.

4 THE COURT: Well, despite everything that I've had
5 before me, the first place, let me respond to the -- what may
6 or may not be an objection, that of the Chambers' parties.
7 It's not clear to me whether this letter belonged in connection
8 with the distribution motion or with this particular motion,
9 but I find no particular merit to it at this point in time. It
10 may be a point of contention when I deal with the matter on the
11 merits, but this is a scheduling hearing. And essentially, it
12 does not deal with the issue of scheduling.

13 And I agree with the trustee with respect to the -- I
14 guess I can call them a family.

15 MR. SHEEHAN; The Serabians, Your Honor.

16 THE COURT: The Serabian family or group for the same
17 reasons, namely standing and also the failure to really address
18 the issues before me by them. That objection, to the extent it
19 is an objection, and it to the extent it goes to the merits of
20 any determination I have to make and with respect also to their
21 standing, I find that there is no merit to the document they
22 filed and it's overruled.

23 With respect to the main issue before me, I've
24 reviewed all of the papers, and that there may be some overlap
25 in connection with the matters that are pending before the

1 district court and here. Clearly, the matter pending before me
2 is a really narrow one, and if I may be so bold as to
3 paraphrase what I have before me in the most simplistic terms,
4 because as you -- those who practice before me, know that I do
5 adhere to the so-called KISS principle, which is Keep It Simple
6 Stupid in the vernacular.

7 Basically, I have a very simple issue before me, to
8 determine and come down with yes, claims should be based upon
9 the period of time that money was with Bernie Madoff, or no,
10 the claimants are not entitled to an enhancement. And that
11 basically is the request that the trustee has made as the issue
12 before me. And I will restrict the briefing to that.

13 I agree that with respect to the HHI group to the
14 extent that there has been a volition not to file a claim and
15 bring the matter before me, that it's not great afoul if they
16 don't take part in the briefing before me, because they are
17 still well represented by the same counsel. And so the
18 positions that they take with respect to enhancement or not
19 will be articulated and heard.

20 How it plays out before Judge Rakoff, since the matter
21 has been withdrawn with respect to the avoidance action and
22 with respect to the other damage issues that are clearly before
23 him, I am not in any position, nor do I intend to deal with
24 that matter. It's already -- those matters are already briefed
25 and before him.

1 So, folks, what we're dealing with is the very simple
2 issue as I framed it, enhancement or not.

3 MR. SHEEHAN: Thank you, Your Honor. The -- I do have
4 an order, Your Honor.

5 THE COURT: I'll entertain it.

6 MR. SHEEHAN: Thank you.

7 THE COURT: I've approved the order.

8 MR. SHEEHAN: Thank you, Your Honor. As I said during
9 argument, I wanted to just briefly put on the record the
10 proposed schedule and I have a suggestion that may accommodate
11 the concerns of counsel with regard to the SEC.

12 As I said we moved everything out about three weeks,
13 and obviously I'll provide your clerks with the -- this in
14 writing as well, but the trustee's brief would be due on
15 October 12th, objections a month later on, November 12th. SEC
16 response, if any, would be November 19th, a week later. And
17 then trustee's reply would be on December 18th, and the hearing
18 would be on January 10th.

19 My suggestion would be this, depending upon -- as Ms.
20 Harris said, she may or may not want to reply to the SEC, I
21 think we could address at that time, Your Honor, I'd like to
22 not try to build in more time than is necessary here. You
23 know, we had the reserve, we're trying to get this issue moved
24 forward. We'd like to keep it. I think we've moved around
25 these dates enough to accommodate concerns about the Jewish

1 holidays, which I think were very appropriate. So we'd like to
2 stick with this schedule and if we need to adjust it at any
3 point, we can come back to Your Honor. I know Your Honor's
4 always receptive to hearing counsel with regard to those
5 issues.

6 THE COURT: Thank you all. I assume you will
7 cooperate with each other with respect to the scheduling.

8 MR. SHEEHAN: Thank you, Your Honor.

9 MS. HARRIS: Thank you.

10 (Proceeding concluded at 10:26 AM)

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I N D E X

RULINGS

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Motion for Order Scheduling Hearing	17	16
on Trustee's Motion Affirming Denial		
of Time-Based Damages Adjustment to		
Customer Claims		

CERTIFICATION

I, Sheila G. Orms, certify that the foregoing is a
correct transcript from the official electronic sound recording
of the proceedings in the above-entitled matter.

Dated: September 6, 2012

**Sheila
Orms**

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